

SERVICE DATE – DECEMBER 30, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35803

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY—PETITION FOR  
DECLARATORY ORDER

Digest:<sup>1</sup> The issue in this proceeding is whether certain proposed rules regarding railroad locomotive idling in the South Coast Air Basin of California would be preempted by 49 U.S.C. § 10501(b) if the United States Environmental Protection Agency were to approve the rules as part of California's air quality management plan under the Clean Air Act. Given the many unresolved issues outside the scope of this proceeding, the Board declines to issue a declaratory order at this time, but provides guidance on the preemption issue and explains that the proposed rules at issue may be preempted by § 10501(b).

Decided: December 29, 2014

On January 24, 2014, the United States Environmental Protection Agency, Region IX (EPA) filed a petition for declaratory order requesting that the Board institute a proceeding to consider whether two rules (the Rules) concerning railroad locomotive idling proposed by the South Coast Air Quality Management District (District) would be preempted by 49 U.S.C. § 10501(b), if EPA were to incorporate the Rules into the California State Implementation Plan (SIP) under the Clean Air Act (CAA), 42 U.S.C. § 7401 et seq. EPA has not expressed a position to the Board as to whether the Rules, if adopted, would be preempted under § 10501(b).

For the reasons discussed below, we conclude that issuing such an order would be premature, and, accordingly, we will deny the petition for declaratory order. However, we will provide guidance on the preemption issue and explain that, based on the information that has been submitted to the Board, the Rules may be preempted by § 10501(b) if EPA were to incorporate the Rules into California's SIP.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

## BACKGROUND

On February 26, 2014, the Board instituted a proceeding to consider the issue presented by EPA. U.S. Env'tl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 1-2 (STB served Feb. 26, 2014). The Board invited interested parties to file new or supplemental comments by March 28, 2014, and replies to those comments by April 14, 2014. Comments were filed by EPA, the District, the California Air Resources Board (CARB), the Commonwealth of Massachusetts Department of Environmental Protection (MassDEP), the Association of American Railroads (AAR), BNSF Railway Company (BNSF), and the Union Pacific Railroad Company (UP). East Yard Communities for Environmental Justice (EYCEJ), the Center for Community Action & Environmental Justice, the National Resources Defense Council, and Sierra Club (collectively, Environmental Advocates) filed joint comments. Replies to the comments were filed by the United States Department of Transportation (USDOT) and the Federal Railroad Administration (FRA), the District, CARB, MassDEP, AAR, BNSF, and UP.<sup>2</sup> On April 18, 2014, the District filed a reply to the USDOT/FRA reply comments.<sup>3</sup> In addition, letters supporting the Rules were filed by United States Representatives Tony Cardenas, Alan Lowenthal, and Henry A. Waxman; Miguel A. Pulido, the Mayor of the City of Santa Ana, California and District Governing Board member;<sup>4</sup> and Chairman William A. Burke of the District Governing Board.

**The District and its development of the Rules.** The District is one of 35 regional air quality management districts created by the California Legislature.<sup>5</sup> The District's responsibility is to monitor the air quality within its borders and ensure that it meets federal standards.<sup>6</sup>

Under the CAA, state and local governments have primary responsibility to meet National Ambient Air Quality Standards (NAAQS).<sup>7</sup> This is achieved through the development of a State Integration Plan or SIP. A SIP is a state's "primary tool for demonstrating the State will meet federal air quality standards."<sup>8</sup> In California, the air quality management districts sponsor rules designed to address air quality issues for SIP inclusion.<sup>9</sup> The SIP is then submitted

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<sup>2</sup> Prior to the Board's decision instituting a proceeding, many of these parties filed replies to EPA's petition. In addition, Norfolk Southern Railway Company (NS) filed a reply. We will refer to AAR, BNSF, NS, and UP collectively as the Railroad Parties.

<sup>3</sup> Although this filing was outside the procedural schedule for this proceeding, we will accept the filing in order to establish a more complete record and because no party will be prejudiced.

<sup>4</sup> The letter was submitted on Mr. Pulido's behalf by the District.

<sup>5</sup> District Reply 2-3.

<sup>6</sup> Id.

<sup>7</sup> Id. at 3.

<sup>8</sup> CARB Reply 5.

<sup>9</sup> Id. at 6; District Reply 3.

to CARB, which assesses whether to include the rules proposed by the districts in the SIP. Once CARB has finalized which rules to include, the SIP is submitted to EPA (in this case, Region IX) for final approval. Courts have stated that EPA's approval of a rule into a SIP gives the rule "the force and effect of federal law." E.g., Safe Air for Everyone v. EPA, 488 F.3d 1088, 1097 (9th Cir. 2007).

The District has not attained the NAAQS for certain pollutants and attributes part of the reason to the significant freight rail traffic and associated facilities concentrated within its borders.<sup>10</sup> Accordingly, in 2006, the District developed the two Rules at issue here: Rule 3501, which requires railroads to keep records of trains that idle 30 minutes or more ("the recordkeeping rule"), and Rule 3502, which limits idling of *unattended* locomotives to 30 minutes under certain circumstances ("the idling limitation rule").<sup>11</sup> However, if a locomotive is equipped with an anti-idling device set at 15 minutes or less, its operator is not required to record information related to idling events of 30 minutes or more.<sup>12</sup> Similarly, a locomotive is in compliance with the idling limitation rule if the locomotive is equipped with an anti-idling device set at 15 minutes or less.<sup>13</sup> The District states that when it developed the Rules, it planned to enforce them as local regulations, and did not seek inclusion of the Rules as part of the SIP.<sup>14</sup> It expresses concerns about its ability to meet NAAQS without implementation of the Rules.<sup>15</sup>

**AAR litigation.** Following the District's development and attempted implementation of the Rules at the local level, AAR, BNSF, and UP filed a complaint against the District in the United States District Court, Central District of California, alleging that, *inter alia*, the Rules were preempted by § 10501(b) and requesting injunctive relief. Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (AAR 2007), No. CV 06-01416-JFW(PLAx) (C.D. Cal. Apr. 23, 2007). The District Court held that the Rules were preempted by § 10501(b) because they were an attempt by the District, a local governmental entity, to directly regulate rail operations and therefore were "exactly the type of local regulation Congress intended to preempt [with the enactment of § 10501(b)] to prevent a 'patchwork' of such local regulation from interfering with interstate commerce." Id. The District Court also concluded that the District did not have authority under California law to "regulate air contaminants from locomotives, and therefore was not acting under the CAA when it adopted the Rules." Id. The District Court entered a permanent injunction enjoining implementation or enforcement of the Rules.<sup>16</sup>

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<sup>10</sup> District Reply 3, 7-8.

<sup>11</sup> The exhibits to EPA's petition include the complete text of the Rules.

<sup>12</sup> Rule 3501(k)(1).

<sup>13</sup> Rule 3502(d). An anti-idling device shuts a locomotive engine down after it has idled for a set time period.

<sup>14</sup> District Reply 5.

<sup>15</sup> Id. at 7-8.

<sup>16</sup> UP Reply 14.

The Ninth Circuit Court of Appeals affirmed AAR 2007 on the basis that § 10501(b) preempted the Rules. Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist. (AAR 2010), 622 F.3d 1094 (9th Cir. 2010). The court reasoned that the Rules were preempted because they “apply exclusively and directly to railroad activity [and] . . . have the effect of managing or governing rail transportation.” Id. at 1098 (internal quotation marks omitted). The court noted, however, that if EPA were to approve the Rules into the California SIP, they would have “the force and effect of federal law.” Id. The court cited a previous Board decision suggesting that §10501(b) may not preempt rules in a SIP that is approved by EPA because such rules could possibly be harmonized with §10501(b). AAR 2010, 622 F.3d at 1098 (citing Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer, 5 S.T.B. 500 (2001)). The court declined to consider the District Court’s alternative holding that the District did not have authority to adopt the Rules under California law; rather, it “assumed without deciding” that the Rules were validly promulgated. AAR 2010, 622 F.3d at 1096 n.1.

On November 2, 2011, the District submitted the Rules to CARB for consideration of inclusion in the state’s SIP.<sup>17</sup> CARB submitted the District’s Rules to EPA on August 30, 2012.<sup>18</sup> EPA’s petition to the Board followed on January 24, 2014.

**The parties’ arguments in this proceeding.** The District, CARB, MassDEP, and Environmental Advocates ask the Board to find that the Rules, if incorporated into California’s SIP, would not be preempted by § 10501(b). The District argues that when presented with a preemption issue involving § 10501(b) and another federal law, the Board must “strive to harmonize the two laws,” citing AAR 2010, 622 F.3d at 1098, and Board decisions such as Cities of Auburn & Kent, Washington—Petition for Declaratory Order—Burlington Northern Railroad—Stampede Pass Line, 2 S.T.B. 330, 337 (1997), which state that § 10501(b) typically does not preempt federal environmental laws, including those implemented or enforced by state and local authorities.<sup>19</sup> The District also argues that the Rules are not burdensome and do not discriminate against the railroads.<sup>20</sup> Finally, the District claims that adoption of the Rules will not lead to a patchwork of local regulations.<sup>21</sup>

CARB also asserts that § 10501(b) does not preempt the Rules and that AAR 2010 requires the Board to harmonize the Rules with § 10501(b).<sup>22</sup> In addition, CARB explains that SIP rules have an important role in giving localities the regulatory flexibility to achieve compliance with the NAAQS.<sup>23</sup> Regarding concerns over the impact of the Rules on uniformity

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<sup>17</sup> District Reply 6.

<sup>18</sup> Id. at 7.

<sup>19</sup> Id. at 13-16.

<sup>20</sup> District Comments 38-41, 48.

<sup>21</sup> E.g., id. at 44-47.

<sup>22</sup> CARB Comments 2-3.

<sup>23</sup> Id. at 6-8.

of regulation, CARB argues that the local, state, and EPA processes of SIP development and approval would address national uniformity issues, and that EPA can require revisions to SIP proposals to ensure harmonization with § 10501(b).<sup>24</sup>

Environmental Advocates express concerns about the health impacts of locomotive emissions from rail yards on District residents<sup>25</sup> and claim that these health impacts disproportionately affect lower-income, minority residents.<sup>26</sup>

AAR, BNSF, NS, and UP assert that a number of issues prevent EPA from allowing incorporation of the Rules into the California SIP.<sup>27</sup> They also argue that, even if EPA approves the Rules, § 10501(b) would preempt them. Specifically, they argue that the Board should find that the Rules would be categorically preempted due to their effect on uniformity of regulation.<sup>28</sup> The Railroad Parties contest CARB's claim that EPA's review process would avoid this problem, arguing that EPA is not charged with maintaining uniformity across air quality control regions and inherently over interstate commerce.<sup>29</sup> The Railroad Parties also argue that a fact-based examination of the effects of the Rules would demonstrate interference with railroad operations and thus support a finding of preemption.<sup>30</sup>

USDOT/FRA ask the Board to consider potential operational and safety impacts of the Rules, some of which relate to possible conflicts with FRA regulations.<sup>31</sup> However, USDOT/FRA do not express an opinion on whether the Rules would be preempted by § 10501(b).<sup>32</sup>

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. Where appropriate, the Board may also provide guidance to assist other government agencies and courts. See Mid-America Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599, slip op. at 3 (STB served June 6, 2005). As discussed below, we conclude that because the parties have

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<sup>24</sup> Id. at 9.

<sup>25</sup> Environmental Advocates Comments 3-4.

<sup>26</sup> EYCEJ Reply 1-2.

<sup>27</sup> E.g., AAR Reply 19-23; BNSF Reply 20-26; AAR Comments 18-20 (arguing inter alia that the CAA would not permit approval of the Rules into the California SIP and that the Rules would not accomplish CAA objectives).

<sup>28</sup> E.g., BNSF Reply 15-20.

<sup>29</sup> BNSF Reply to Comments 21-23.

<sup>30</sup> E.g., UP Reply 22-29.

<sup>31</sup> USDOT/FRA Reply to Comments 2-4.

<sup>32</sup> Id. at 2 n.1.

raised many issues outside the Board's purview that control whether or not EPA can even incorporate the Rules into California's SIP, it would be premature for us to issue a declaratory order. However, we will provide guidance on the nature and extent of § 10501(b) preemption to assist parties in any future proceedings and explain that, based on the current record, the Rules would likely be preempted if EPA were to incorporate the Rules into California's SIP.

**A declaratory order at this time would be premature.** EPA has asked the Board to consider a specific issue: whether the Rules would be preempted by § 10501(b) *if* they were approved into the California SIP under the CAA.<sup>33</sup> However, the Railroad Parties argue that EPA cannot properly approve the Rules into the California SIP in the first place, for a number of reasons. For example, they claim that the CAA requires states to show that federal or state law does not prohibit a proposed SIP rule,<sup>34</sup> and that here, the District cannot make this showing. The Railroad Parties point to the fact that the District Court found the Rules to be unlawful under California state law in AAR 2007.<sup>35</sup> In addition, the Railroad Parties argue that the Rules are prohibited by the CAA itself because, under that law, states cannot create "any standard or requirement relating to the control of emissions" from new locomotives.<sup>36</sup> The Railroad Parties acknowledge that states can bypass this CAA prohibition by obtaining a waiver from EPA to regulate locomotives (at least those not considered new), but point out that California has not sought such a waiver.<sup>37</sup> The parties that support the Rules disagree with the arguments made by the Railroad Parties and question the relevance of such arguments to this proceeding.<sup>38</sup>

We will not address the merits of the arguments regarding EPA's ability or inability to approve the Rules into the SIP because these questions are not within the purview of the Board. However, it appears that these issues would indeed need to be addressed before EPA could approve inclusion of these Rules in California's SIP. We therefore conclude that a declaratory order deciding preemption under § 10501(b) would be premature given these outstanding questions. However, we will provide the following guidance summarizing the relevant court and agency case law on the nature and extent of § 10501(b) preemption and how it might apply to the incorporation of the Rules into the California SIP. If EPA subsequently does approve the Rules as part of the California SIP, the preemption issue will then be ripe for review and any party may petition the Board for a formal preemption determination.

**Preemption under § 10501(b).** The Interstate Commerce Act is "among the most pervasive and comprehensive of federal regulatory schemes." Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981). The preemption provision of the Act, as broadened by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803, expressly

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<sup>33</sup> EPA Comments 1-2.

<sup>34</sup> AAR Reply 19-22 (citing 42 U.S.C. § 7410(a)(2)(E)(i)); UP Reply 15 & n.47.

<sup>35</sup> E.g., BNSF Reply 20-26.

<sup>36</sup> AAR Reply 22-23 (citing 42 U.S.C. § 7543(a), (e)).

<sup>37</sup> Id. at 22.

<sup>38</sup> E.g., District Comments 12-19, 24-27.

provides that the jurisdiction of the Board over “transportation by rail carriers” is “exclusive.” § 10501(b). The statute defines “transportation” expansively to encompass “a locomotive, car, . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property . . . by rail” as well as “services relating to that movement.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation. 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. See Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808 (“[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.”).

The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b). Compare e.g., Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1339 (11th Cir. 2001) (declining to find preemption of city’s zoning ordinance for railroad-owned facility that was not used in rail transportation because application of the ordinance would not “burden [the railroad] with the patchwork of regulation that motivated the passage of [§ 10501(b)]”) with Fayus Enters. v. BNSF Ry., 602 F.3d 444, 452 (D.C. Cir. 2010) (finding that application of state antitrust laws to rail transportation would “subject [shipments] to fluctuating rules as they crossed state lines” and therefore “directly interfere” with the purpose of § 10501(b).) and CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 11 (STB served March 14, 2005), recons. denied (STB served May 3, 2005) (finding local regulation regarding routes for rail transportation of hazardous materials through the District of Columbia preempted because such regulation would interfere with interstate commerce and lead to piecemeal regulation, subverting the purpose of § 10501(b)).

When examining state or local action affecting rail transportation, preemption under § 10501(b) may be categorical or “as applied.” Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 4-5 (STB served Jan. 27, 2014). Categorically preempted actions are preempted “regardless of the context or rationale for the action.” CSX Transp., Inc.—Pet. for Declaratory Order, slip op. at 3 (STB served May 3, 2005). The Board and the courts have found that § 10501(b) categorically prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005).

Other state or local actions may be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. See N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation”); Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (Ayer), 5 S.T.B. 500 (2001), recons. denied 5 S.T.B. 1041 (2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999).

The Board has stated that federal environmental statutes such as the CAA, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads. E.g., Grafton & Upton R.R.—Pet. for Declaratory Order, FD 35779, slip op. at 6. The Board also has acknowledged state and local agencies’ role in enforcement of federal environmental statutes and has stated that § 10501(b) is not generally intended to interfere with that role. Ayer, 5 S.T.B. at 508. However, actions taken and regulations enacted under federal environmental statutes or other federal statutes may directly conflict with the purposes and regulatory scheme under the Interstate Commerce Act. When such a conflict occurs, the Board or a court must determine whether the two federal statutes and their applicable regulatory schemes can be harmonized. AAR, 622 F.3d at 1097-98; Ayer, 5 S.T.B. at 509 n.28 (two federal statutes should be harmonized unless there is a “positive repugnancy” or “irreconcilable conflict” between them). As explained below, if EPA were to approve the Rules as part of California’s SIP, it appears, based on the current record, that the Rules likely would be preempted by § 10501(b) even under the harmonization standard.

**The Rules likely cannot be harmonized with the purposes of §10501(b).** If EPA were to approve the Rules as part of California’s SIP, it is likely that the Rules would be preempted because of the potential patchwork of regulations that could result, contravening Congress’s purpose in enacting § 10501(b). If the Rules were adopted into the California SIP, locomotives would be subject “to fluctuating rules as they cross[] state lines” (and as they cross air quality regions), and the Rules would therefore likely “directly interfere” with the purpose of § 10501(b). See Fayus Enters., 602 F.3d at 452. Moreover, it is not only the impact of the District’s rules that we must consider, but the fact that other states and local districts throughout the country could follow suit and adopt their own emission rules. The District claims that it is unlikely that approval of the Rules into the California SIP would lead to similar proposed rules in other states, but the record appears to indicate otherwise. According to AAR, more than 100 nonattainment districts are spread across more than 40 states.<sup>39</sup> Massachusetts and Rhode Island have previously enacted idling rules,<sup>40</sup> and Maine, Michigan, and New Hampshire have

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<sup>39</sup> AAR Comments 5.

<sup>40</sup> Id. at 6-7, 7 n.8. While Massachusetts and Rhode Island have enacted idling rules, no party has asked this agency to consider whether § 10501(b) preempts those regulations.



considered such laws.<sup>41</sup> Approval of the Rules here would likely signal to other localities that they also could propose their own rules on locomotive operations to meet localized concerns through the SIP process, thereby leading to the lack of uniformity of regulation that Congress intended to preclude in §10501(b). Such a variety of localized regulations would likely have a “practical and cumulative impact” on rail operations on the national rail network. See CSX Transp., Inc. v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005).

We disagree, at least based on the record here, with the District’s claim that adoption of the Rules would not interfere with rail operations.<sup>42</sup> The District argues that Rule 3501 is merely a record-keeping requirement and thus does not impede the flow of transportation. However, Rule 3501 would potentially create a patchwork of localized, operational recordkeeping requirements that would likely affect railroad operations. More than 100 nonattainment districts exist, and if the District’s recordkeeping rule were implemented, other nonattainment districts across the country could, and likely would, implement their own, unique recordkeeping requirements.

The District claims that Rule 3502 addresses unnecessary idling that has no transportation purpose. Here too though, adoption of Rule 3502 would likely affect the railroads’ ability to conduct their operations, as it appears to decide for the railroads what constitutes unnecessary idling and also to influence the railroads’ choice of equipment and how to configure that equipment. Allowing potentially 100 different localities to adopt their own idling rules also would likely disrupt uniformity in rail operations by opening the door to varying regulatory operational and/or equipment requirements for locomotives across the country.<sup>43</sup> Moreover, as discussed below, USDOT/FRA raise concerns regarding operational inefficiencies, safety, and delays that may result from implementation of the Rules.<sup>44</sup>

The District argues that any concerns over differing, localized regulations on locomotive emissions could be addressed through the state/local process of developing California SIP rules and EPA’s review process for approving new SIP rules.<sup>45</sup> However, no party describes in the record here the EPA or the state/local process for developing and approving proposed SIP rules in enough detail to allow us to fully assess these arguments. In particular, it is unclear whether

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<sup>41</sup> BNSF Reply to Comments, V.S. Ratledge 13-14.

<sup>42</sup> District Reply 40.

<sup>43</sup> CARB is incorrect when it suggests that AAR 2010, 622 F.3d at 1098, essentially requires us to conclude that the Rules can be harmonized with § 10501(b) and therefore are not preempted. AAR 2010 merely notes that § 10501(b) “generally does not preempt” the implementation of federal environmental rules. 622 F.3d at 1098. AAR 2010 does not mandate a method for conducting a harmonization analysis nor does it determine whether the particular rules at issue in this proceeding could be harmonized with the Interstate Commerce Act preemption provision. See id.

<sup>44</sup> USDOT/FRA Reply to Comments 2-4.

<sup>45</sup> District Reply 27; MassDEP Comments 9; CARB Comments 9.

EPA must, or would even be permitted to, consider the potential effects on interstate commerce when deciding whether to incorporate particular state and local provisions into a SIP under the CAA, and could thereby take steps to avoid creating a unworkable array of regulations.

It is unlikely we would be persuaded by the District's argument that the railroads could achieve regulatory compliance with differing emissions rules by developing systems that allow for variability in idling. The District points to the fact that railroads have systems for compliance with local speed restrictions and quiet zones where horn blowing is restricted, and argues that they could also develop systems to comply with differing local rules on locomotive idling.<sup>46</sup> But these are not apt comparisons. Quiet zones are simply marked by signs, and speeds are given in timetables that crews can easily follow.<sup>47</sup> Requiring railroad employees to comply with idling and recordkeeping rules for each jurisdiction, in contrast, would likely result in an unworkable variety of regulations.

We do not suggest that every existing federal regulation that may affect railroad operations is preempted by § 10501(b). However, based on the current record, it appears that allowing states and localities to create a variety of complex regulations governing how an instrument of interstate commerce is operated, equipped, or kept track of (even if federalized under the CAA) would directly conflict with the goal of uniform national regulation of rail transportation. For this reason, based on the current record, we find that the Rules likely would be preempted by § 10501(b).

**The Rules may conflict with other federal statutes.** The record here also suggests that adoption of the Rules into the California SIP could conflict with obligations imposed under other federal laws. While interpretation of statutes other than the Interstate Commerce Act is beyond our purview, it appears that adoption of the Rules may interfere with EPA's own regulations on locomotive emissions enacted pursuant to the CAA. While EPA's national rule regarding locomotive emissions allows anti-idling devices to be set at 30 minutes or less, 40 C.F.R. § 1033.115(g)(1), the District's proposed rules would require devices to be set to 15 minutes or less. Rule 3501(d)(3), (e)(2); Rule 3502(d). But because railroads cannot easily reset the devices as trains cross into different jurisdictions,<sup>48</sup> and railroads regularly interchange locomotives and operate other railroads' locomotives,<sup>49</sup> they would effectively need to comply with the District's requirement of a 15-minute anti-idling device setting across their networks, not just within the District. As a result, the 15-minute setting for idling devices could result in national application of a more restrictive idling standard than currently exists under EPA's own

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<sup>46</sup> District Comments 46-47.

<sup>47</sup> See BNSF Reply to Comments, V.S. Ratledge 16.

<sup>48</sup> See BNSF Reply to Comments, V.S. Ratledge 7.

<sup>49</sup> As discussed supra, we are unpersuaded by the District's claim that the railroads can adopt systems that will allow them to set the level of idling to match the requirements for that jurisdiction.

nationwide rule regarding locomotive idling.<sup>50</sup> Moreover, each time EPA adopts a different or more restrictive standard proposed by a state or locality, it could force the railroads to alter their locomotive operations nationally in response, creating a continually changing standard. We do not believe that Congress intended such a result. See § 10501(b); H.R. Rep. No. 104-311, at 95-96.

Furthermore, FRA, the agency with primary responsibility over railroad safety, raises concerns in the USDOT/FRA comments that there are inconsistencies between the Rules and FRA regulations, which could detract from the safe and efficient operation of the national rail network.<sup>51</sup> Specifically, USDOT/FRA suggest that, if adopted into the SIP, the Rules could impact the way certain FRA-required safety tests are conducted, compromise air brake systems, and lead to system-wide railroad delays.<sup>52</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. EPA's petition for declaratory order is denied, as discussed above.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

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<sup>50</sup> UP Reply, V.S. Iden 4 (note map showing extensive path of UP locomotive over 60-day period).

<sup>51</sup> The District argues that USDOT/FRA's opinion was developed in response to a solicitation by AAR and does not reflect a complete understanding of the Rules and the state and local process under the CAA. District Comments 40-41. Before the comments were filed, however, USDOT/FRA had the opportunity to review the relevant materials up to the March 28, 2014 filings in this proceeding, and continued to express concerns about inconsistencies between the Rules and FRA regulations. See USDOT/FRA Reply to Comments 2-4; District Comments, Official Notice Tab 5; id. at Official Notice Tab 6.

<sup>52</sup> USDOT/FRA Reply to Comments 2-4. In particular, FRA notes that it might take more than the 30 minutes a train is allowed to idle for a train crew to conduct safety critical tests and inspections.